2005

Restitution

Tiong Min YEO
Singapore Management University, tmyeo@smu.edu.sg

19. RESTITUTION

YEO TIONG MIN
LLB (Hons) (National University of Singapore), BCL, DPhil (Oxford);
Advocate and Solicitor (Singapore);
Associate Professor, Faculty of Law, National University of Singapore.

Introduction

19.1 In the year under review, there have been a number of very important observations by the Singapore Court of Appeal especially on the equitable side of the law of restitution. Highlights include the acceptance of the power to order an account of profits for breach of contract in exceptional circumstances; the suggestion that the account of profits remedy could be more widely available, beyond breaches of contract, in equity's auxiliary jurisdiction coming in aid of common law and statutory rights; and the use of equitable subrogation as a tool to reverse unjust enrichment in appropriate cases.

Restitution for wrongs

Account of profits for breach of contract

19.2 In the important but controversial case of *Attorney General v Blake* [2001] 1 AC 268 ("*AG v Blake*"), the House of Lords departed from the entrenched principle in contract law that the plaintiff is only entitled to *compensation* for his *losses* arising from a breach of contract. Although the decision has received a cool reception in Australia, principally because of a difference of view on the objectives of contract law (see *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157 at [155]–[159]; *Multigroup Distribution Services Pty Ltd v TNT Australia Pty Ltd* (2001) 191 ALR 402; *Biscayne Partners Pty Ltd v Valance Corp Pty Ltd* [2003] NSWSC 874 at [228]–[237]), it has been very influential in Singapore law.

19.3 The first time the principle of restitution for breach of contract was considered by the Singapore Court of Appeal was in *Friis v Casetech Trading Pte Ltd* [2000] 3 SLR 590, before the House of Lords delivered its decision in *AG v Blake*, where the court only had the benefit of the English Court of Appeal decision in *Attorney General v Blake* [1998] Ch 439. In *Friis v Casetech Trading Pte Ltd*, the Singapore Court of Appeal, in *obiter* (the court did not consider that the restitutionary remedy was warranted on the facts), cited (at [39]) with approval the observations of Lord Woolf MR in the English Court

of Appeal (at 458) on the availability of restitutionary awards for breach of contract in two situations: when the defendant fails to provide the full extent of the services he had contracted to provide and for which he has charged the plaintiff; and where the defendant has obtained his profit by doing the very thing which he had contracted not to do. This must now be read in the light of the House of Lords decision and a subsequent Court of Appeal decision in Singapore.

19.4 The House of Lords in *AG v Blake* (*supra* para 19.2), while affirming the availability of restitutionary awards for breach of contract, confined its decision to the account of profits in exceptional circumstances, and rejected the two guidelines in the Court of Appeal (*supra* para 19.3) as unreliable guides to the existence of the requisite exceptional circumstances. In *Teh Guek Ngor Engelin née Tan v Chia Ee Lin Evelyn* [2005] 3 SLR 22, the Singapore Court Appeal, affirming the High Court decision of *Chia Ee Lin Evelyn v Teh Guek Ngor Engelin née Tan* [2004] 4 SLR 330, restated Singapore law to be in accordance with the House of Lords decision in *AG v Blake*. The case arose from an alleged wrongful termination of a consultancy contract. The respondent alleged that the appellant had wrongfully terminated the consultancy agreement and had failed to pay the respondent the share of profits to which she was entitled under the agreement. The trial judge found in the respondent's favour. On appeal, the Court of Appeal affirmed the findings of the trial judge, challenged by the appellants, that there was no agreement of compromise between the parties after the alleged termination, that the consultancy agreement had not been terminated by mutual consent, and that there was no oral agreement that the respondent was to refund to the appellant a share of the profits to which the respondent had been entitled under the consultancy agreement.

19.5 The point of interest for this chapter arose from the appeal on the point of damages. Although the Court of Appeal held that the trial judge had been correct in his application of the principles of law to the quantification of the damages for the breach of contract (and therefore dismissed the appeal on all grounds), it made important *obiter* observations on an alternative remedy sought by the respondent. Although the respondent had claimed damages for wrongful termination of the consultancy agreement, she had, in the alternative, sought an order for an account of all sums due to her from the appellant. The Court of Appeal took this to be effectively a request for the equitable remedy for an account of profits. The court took the opportunity to state the law of Singapore on the availability of this remedy for breach of contract.

19.6 The Court of Appeal emphasised that the normal remedy for breach of contract remains *compensatory* (at [17]). However, taking the lead from the judgment of Lord Nicholls of Birkenhead in *AG v Blake*, the court accepted that the remedy of account of profits would be available only in exceptional circumstances. The following passage from Lord Nicholls' speech (at 285) was emphasised by the Court of Appeal and bears repeating:

> No fixed rules can be prescribed. The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit.

19.7 Significantly, the court also endorsed Lord Nicholls' statement (*ibid*) that neither of the two suggested guidelines from Lord Woolf MR in the English Court of Appeal (*supra* para 19.3) would, by themselves, constitute good reasons for ordering an account of profits. The Singapore Court of Appeal made it clear (at [18]) that the remedy of an account of profits would not be available for cases of wrongful termination generally. The court noted (*ibid*) the unusual relationship between the parties: although it was based on a consultancy contract, the respondent had additional duties and was entitled to a share of the profits, yet this was not enough to amount to exceptional circumstances for an account of profits.

19.8 This clarification of the applicability of the principle in *AG v Blake* for Singapore is welcome, even if its application in England has caused difficulty. The English courts are just beginning to grapple with the cases coming before them, and no firmer guideline on the scope of the principle than what has been stated above has so far emerged. The relationship between the (equitable) account of the entire profits awarded in *AG v Blake* itself and (common law) restitutionary damages of a percentage of the profits made from the breach of the contract (an alternative justification of the award in *Experience Hendrix LLC v PPX Enterprises Inc* [2003] FSR 46 ("*Hendrix*"), especially at [26], [34]–[35]) by analogy with the statutory jurisdiction to award damages in lieu of an injunction (Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed), s 18(2), First Schedule, para 14; and *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 1 WLR 798 ("*Wrotham Park*")) remains to be worked out. In *AG v Blake*, Lord Nicholls (with whom Lord Goff of Chieveley and Lord Browne-Wilkinson agreed) considered the *Wrotham Park* line of authorities as a crucial step in the analysis leading to

the restitutionary account of profits remedy (at 283–284), Lord Steyn put it to one side (at 291), and Lord Hobhouse of Woodborough (dissenting) saw it as clearly compensatory (at 298). *Hendrix* itself (at [34]) suggests that the common law remedy has been freed from the fetters of the statutory jurisdiction (which depends on the actual availability of injunctive remedies). While the common law remedy would be available as of right, it may be confined to cases protecting recognised property interests; otherwise it would become a *normal* remedy for every breach of contract (see para 19.6 above), since every breach of contract involves the deprivation by the party in breach of something valuable from the innocent party, be it the (user) value of the right in question or the opportunity to bargain for release from the contractual obligation. There are other difficulties: the relationship between the common law, equitable, and statutory remedies that provide restitution for breach of contract; the appropriate quantum of the award; the scope of what amounts to exceptional circumstances that merit a restitutionary remedy; and, at least in other jurisdictions which have expanded their law on exemplary damages, the relationship between this restitutionary remedy and exemplary damages for breach of contract (see *eg*, *Bank of America Canada v Clarica Trust Company* [2002] 2 SCR 601; in Singapore law, see *CHS CPO GmbH v Vikas Goel* [2005] 3 SLR 202 at [66]–[67]). These are legal issues that await further clarification from the courts in the Commonwealth.

19.9 Moreover, this clarification of the scope of *AG v Blake* for Singapore law is welcome, even if on the facts this may not even have been a case where a restitutionary remedy was being sought. An account of profits is a remedy with many faces. It appears from the High Court decision in *Chia Ee Lin Evelyn v Teh Guek Ngor Engelin née Tan* (*supra* para 19.4, at [2]) that the respondent's "claim is for an account of all sums due to her under the relevant written consultancy agreement and payment to her of all sums found due". This appears to be nothing more than asking for the *performance* of the contract; the remedy of account sought is used as a means to enforce a *primary* contractual right to the payment of a share of the profits. In so far as there is a *restitutionary* response from the law in this context, the right to restitution arises from the *consent* of the parties. There is no question of proving exceptional circumstances in order to get this remedy; the court is merely ordering the payment of a sum of money due under a contract. It is analogous to an action for an agreed sum at common law. A contractual account remedy is different from damages for breach of contract, though in many cases the plaintiff may end up getting the same amount of money. The crucial distinction is that in the former case, the rules of causation, remoteness and mitigation, which go to define the loss of the plaintiff, are irrelevant.

19.10 On the other hand, the remedy of account of profits in *AG v Blake* addresses a different situation, where there is no primary contractual right to the profits, but the plaintiff is asking for an account of profits as a *remedy* for breach of contract; in the language of rights, the plaintiff is seeking to enforce a *secondary* right to restitution, much as a plaintiff ordinarily seeks to enforce a secondary right to damages for breach of contract. The restitutionary response in *AG v Blake* arises from the event of a *wrong* – the breach of contract. Of course, the restitutionary account of profits for breach of contract argument could also have been mounted in *Teh Guek Ngor Engelin née Tan v Chia Ee Lin Evelyn* (it can be raised in any case of breach of contract). The Court of Appeal (*supra* para 19.4 at [17]) also saw the claim as one for "an account of all sums *due*" [emphasis added] to the respondent, but it is not clear why it was assumed that the (restitutionary) sums were due because of the *breach* of contract. The remarks of the Court of Appeal must be understood in this context.

Account of profits for other wrongs?

19.11 *Ng Bok Eng Holdings Pte Ltd v Wong Ser Wan* [2005] 4 SLR 561 is a very important case that extended the remedy of an account of profits beyond breaches of contract. It is even more important in its statement of the flexibility of the equitable jurisdiction in Singapore. With this case, the Singapore Court of Appeal has also demonstrated that equity (in the law of restitution and elsewhere) is very much alive in Singapore, and capable of incremental expansion to meet new situations.

19.12 The facts can be simplified for the purpose of this review. N, the then husband of the respondent, had transferred an immovable property and shares in a company respectively to the two appellants, two companies owned and controlled by N and his family members, at a time when his marriage with the respondent was in difficulties. The transfers had been executed before N became a bankrupt. The respondent claimed that N had owed her substantial sums of money under an agreement, as well as under a consent order pursuant to which N was supposed to pay the respondent maintenance. The respondent claimed that N had sold his assets to the appellants at a serious undervalue in order to sequestrate the assets from her claims, and that these transactions contravened s 73B of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed). This section provides:

> (1) Except as provided in this section, every conveyance of property, made whether before or after 12th November 1993, with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced.

> (2) This section does not affect the law relating to bankruptcy for the time being in force.
>
> (3) This section does not extend to any estate or interest in property disposed of for valuable consideration and in good faith or upon good consideration and in good faith to any person not having, at the time of the disposition, notice of the intent to defraud creditors.

19.13 In the High Court (*Wong Ser Wan v Ng Bok Eng Holdings Pte Ltd* [2004] 4 SLR 365), Judith Prakash J had found in the respondent's favour. The court found that the elements of the respondent's claim in accordance with s 73B had been made out. The court found that the respondent was a creditor of N, who had acted fraudulently to reduce the matrimonial assets to which the respondent would be entitled, and that the appellants, being under N's control, were affixed with N's knowledge and had not purchased the assets in good faith, even though they had paid US$2m and US$1m for the immovable property and the shares respectively. (The immovable property was estimated to be worth between US$5m and US$8m). The court set aside the transactions, and also ordered the appellants to account for the profits received or made by the appellants in receiving the two assets.

19.14 The appellants appealed on four main grounds: (a) that N had no intention to defraud his creditors at the time the assets were transferred; (b) that at the time of the transfers, the respondent was not a creditor of N who had been prejudiced by the transfers; (c) that even if N had the requisite intention, the appellants had no notice of the intention; and (d) the High Court should not have made an order to account.

19.15 On the first issue, the Court of Appeal (*supra* para 9.11) affirmed the finding of fact by the High Court that N had transferred the assets with fraudulent intention. The Court of Appeal was of the view that there was direct evidence of such intention. It also observed (at [31]–[32]) that, even if there was no direct evidence, although the court would be very cautious about making an inference from the surrounding circumstances, there was sufficient evidence on the facts to justify such an inference. On the second issue, the Court of Appeal disallowed the argument on the basis that it was a new point not raised in the High Court and leave had not been sought to raise it. In any event, the court was clear in its mind that, in view of the agreement between the parties that had been breached by N many times, and of the consent (maintenance) order of the court under which N had fallen in arrears of payment, the respondent was clearly a creditor at the time of the transfers. Thus, the court also did not have to decide whether the protection in s 73B could only be invoked by creditors; the operative words for standing

to sue appear to be a person "prejudiced" by the transaction (*cf Cadogan v Cadogan* [1977] 1 WLR 1041). On the third issue, the appellants argued that it must be shown that the transferee had actual knowledge, and not just constructive knowledge. The Court of Appeal affirmed the finding of actual knowledge in the High Court, and thought it was unnecessary to rule on the issue whether anything beyond actual knowledge would disentitle the transferee from the protection of s 73B(3).

19.16 The real point of interest for this review arises from the fourth issue. On this point, the appellants relied on a number of authorities to argue that the court would reverse the fraudulent transaction but would do no more; in particular, it would not order an account of profits. The Court of Appeal rejected this argument, and relied on its general "[p]ower to grant all reliefs and remedies at law and in equity" under para 14 of the First Schedule to the Supreme Court of Judicature Act. In a very significant pronouncement, the court in the present case stated (at [54]):

> While it is true that an account of profits is the traditional remedy for breaches of equitable obligations, it did not mean that that remedy may not be granted by the court in other situations. No rule should remain immutable in the eyes of equity. Ultimately, it is the justice of the case which will dictate what relief will be appropriate.

19.17 The Court of Appeal also found the jurisdiction in *AG v Blake* (*supra* para 19.2) to award an account of profits in exceptional cases of breaches of contract to be both relevant and persuasive. The Court of Appeal said (at [58]) that the relevant question was whether the avoidance of the fraudulent transfers alone would be an adequate remedy to deal with the mischief behind the enactment of s 73B. The court then emphasised that no answer could be given in the abstract, and every case had to be decided on its own facts. On the facts, the court held that the account of profits should have been ordered from the date N became bankrupt, rather than the dates of the transfers, because N had the freedom to dispose of his property until that date.

19.18 The court appeared to have adopted an *ad hoc* approach in deciding whether an account of profits is appropriate, and if appropriate, its quantum. It is probably desirable, however, that the courts should provide at least some broad guidelines on when and how this jurisdiction will be exercised. The significance of finding an underlying rationale goes beyond providing guidance in future cases. It may have further impact on the development of general restitutionary (See *eg*, M J Bodie, "Restitution for Fraudulent

Conveyances" (1992) 7 Otago L Rev 597), or compensatory, or proprietary remedies (including those following a tracing exercise) in such contexts.

19.19 On a property analysis, if the court order had revested the property in the bankrupt's estate retrospectively from the date of the transfer, then ordinarily all profits from that date should follow the ownership of the property as the fruits of the property. This appears to be the view taken in the High Court (*supra* para 19.13). If the basis of the award is to disgorge profits from a wrong, then there would appear to be no reason to allow the transferee to keep a part of the profits. If the basis of the award is to prevent the unjust enrichment of the transferee, then it could be argued that the profits earned before the date of N's bankruptcy were *not at the expense* of the bankrupt's estate because N had the freedom of disposal of the property up to that date. If the basis is to recompense the creditors for the direct damage suffered as a result of the fraudulent conveyance (see *Cadogan v Cadogan, supra* para 19.15), then it could be said that the creditors did not suffer the loss of profits before N's bankruptcy because N was free to dispose of any profits as he wished. It appears that either compensation or the reversal of unjust enrichment may provide the explanation on these facts, but in other cases, the measure may not be the same. The losses and gains may not always correspond.

19.20 The broader question that arises is whether this power to award an account of profits will be available in more situations, particularly in the auxiliary jurisdiction where equity comes to the aid of legal (common law and statutory) rights. Whether it is actually granted will, naturally, depend on the particular circumstances. Historically, courts of common law and equity had concurrent jurisdiction in fraudulent conveyance cases (*Hobbs v Hull* (1788) 1 Cox 445; 29 ER 1242), so this decision could be explained as the incremental expansion of an ancient jurisdiction. However, this was not how the Court of Appeal approached the issue; the analogy drawn from *AG v Blake* (*supra* para 19.2) and the reference to adequacy of remedies suggest that the court was defining its auxiliary equitable jurisdiction. It should also be noted that the breadth of para 14 of the First Schedule to the Supreme Court of Judicature Act has recently also been emphasised by the Court of Appeal in a different context: *Chin Bay Ching v Merchant Ventures Pte Ltd* [2005] 3 SLR 142.

19.21 *Ng Bok Eng Holdings Pte Ltd v Wong Ser Wan* (*supra* para 19.11) has opened up the possibility of arguments for accounts of profits being made in, for example, tort claims, beyond the restitutionary claims already available in torts that protect property, *viz*, in waiver of tort, restitutionary damages and

damages based on the user principle. It may be that the Singapore court will, for example, be receptive to arguments for an account of profits in, say, an action for deceit, even though English law has turned its face against this extension (*Halifax Building Society v Thomas* [1996] Ch 217; *Murad v Al-Saraj* [2005] EWCA Civ 959 at [46]). The flexible approach of the Singapore court suggests that it might also be amenable to the argument to use the account of profits as the main vehicle for disgorging profits from wrongdoing (Sam Doyle and David Wright, "Restitutionary Damages – The Unnecessary Remedy?" (2001) 25 Melb U L Rev 1).

Subrogation to reverse unjust enrichment

19.22 The Singapore Court of Appeal dealt with an important point of subrogation in *United Overseas Bank Ltd v Bank of China* [2006] 1 SLR 57, affirming the High Court in *Bank of China v Yong Tze Enterprise (Pte) Ltd* [2005] 2 SLR 761. The facts stated here are simplified. The respondent was the paramount mortgagee of a housing development. A house-buyer took partial finance from OCBC Finance Ltd ("OCBC") to purchase one of the houses in the project. The developer subsequently executed a second mortgage over the development land in favour of the respondent. The house-buyer refinanced the housing loan with the appellant bank, to be secured by a legal mortgage of the property. The developer defaulted on its loan, and so did the house-buyer. The appellant alleged that (a) the respondent was estopped by a number of representations in a letter sent to the developer from denying that the property would be discharged from the paramount mortgage upon receipt of 85% of the sale price of the property; and (b) the appellant had, by the principle of subrogation, stepped into the shoes of OCBC after paying OCBC the amount owed by the house-buyer, and was thereby entitled to the benefit of the representation.

19.23 The High Court upheld the decision of the assistant registrar in favour of the respondent, and the Court of Appeal dismissed the appeal for the following reasons. On the estoppel point, the evidence, especially the existence of a subsequent letter from the respondent to the developer to the effect that the paramount mortgage would be discharged in respect of houses sold only upon receipt of 100% of the purchase price, did not disclose any representation to discharge the paramount mortgage upon receipt of 85% of the purchase price at the time of the appellant's refinancing of the loan. The Court of Appeal noted (at [13]) that the appellant's claim was actually founded on promissory estoppel, but was content for the purpose of argument to assume that the appellant could rely on promissory estoppel in the case. The court held further that even if there had been a representation,

in the circumstances, it was wholly unreasonable for the appellant to have relied on the representation without obtaining any confirmation from the respondent.

19.24 The appellant's case would have fallen at this juncture, but the court went on to make some interesting comments on the law of subrogation as it could have applied on the facts. The court noted (at [26]) that subrogation is based on the implied understanding of the new lender that he is to have a certain security for the money he has advanced to pay off the old lender. According to the court, this meant that the appellant would have failed on this point as well because there was no basis for the appellant to assert that there was an implied understanding that the paramount mortgage would be discharged in respect of the property upon payment of 85% of the purchase price. For the same reasons above, the appellant should have obtained confirmation of the position from the respondent. In other words, the basis for the lender's belief in the existence of the security must be a reasonable one; a payer who did not take reasonable steps to secure his own position would not be entitled to subrogation.

19.25 It is not clear, however, how this observation sits with the further observations of the court on the nature of the subrogation remedy. The court (at [27]) adopted the reasoning of Lord Hoffmann in *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 ("*Banque Financière*") that the equitable remedy of subrogation did not depend on the intention of the parties, but on the principles of unjust enrichment: whether the defendant had been enriched at the expense of the plaintiff, whether the enrichment was unjust, and whether there were reasons of policy for denying the restitutionary remedy. However, in the House of Lords, both Lord Steyn (at 227) and Lord Hoffmann (at 235) asserted that carelessness was not a ground for denying the subrogation remedy, relying on the general position in the law of restitution that a careless payer is not for that reason alone disentitled from restitution. (For this proposition in Singapore law, see *Borneo Motors (S) Pte Ltd v William Jacks & Co (S) Pte Ltd* [1992] 2 SLR 881 at 886, [22].)

19.26 To be consistent with *Banque Financière*, if carelessness did figure in the present case, it cannot be in the context of a mistaken assumption of the existence or validity of the security. This part of the case is better explained by the absence of an unjust factor. Could the appellant have succeeded on mistaken conferment of benefit here? If the basis for the claim was the *promise* to discharge the paramount mortgage over the property, it could be argued that there could not have been a mistake here, but only a misprediction which does not ground any restitutionary relief (*Info-*

communications Development Authority of Singapore v Singapore Telecommunications Ltd (No 2) [2002] 3 SLR 488 at [107]–[113]). But the assumption of the *existence* of a binding undertaking by a third party could amount to a mistake (as it did in *Banque Financière*). Thus, it could be that when the court said that there was no basis for the assertion of an implied understanding on the conditions of the discharge of the paramount mortgage over the property, it did not mean that it was unreasonable for the appellant to hold that belief, but that, in the circumstances, it did not have any basis for asserting that it held that belief at all. On this basis, this would have been a case of no mistake, rather than an unreasonable mistake.

19.27 Further, the court held (at [29]) that there was no basis for arguing that the denial of subrogation to the appellant would give rise to the unjust enrichment of the respondent. The court pointed out that the subrogation being argued for in the case was against the paramount mortgagee, not the borrower; a borrower could have been unjustly enriched by having the benefit of a discharged security effectively for nothing, but here the contest was between the lender and a third party, the paramount mortgagee. It is suggested that the true distinction is not whether the defendant is the borrower or a third party. In *Banque Financière*, a lender who had advanced money to pay off the first charge, without expressly providing for any security, but on the understanding that all other lenders within the corporate group would not demand repayment until the lender had been paid, was allowed to subrogate to the first charge because otherwise the second chargee would have been unjustly enriched at the lender's expense. The second chargee was for all practical purposes a third party, because even though it was part of the group, the negotiators had no authority to bind it, which was why the basis of the subrogation existed in the first place. The question in every case is whether the defendant has been unjustly enriched at the plaintiff's expense. The real distinction between *Banque Financière* and *United Overseas Bank Ltd v Bank of China* is that the lender in the former had clearly improved the position of the second chargee, while in the present case, the paramount mortgagee's position was unaffected by the refinancing transaction of the appellant. There was no enrichment at all.

Tracing

Money claims at common law and in equity

19.28 In a previous decision, the Singapore Court of Appeal in *Caltong (Australia) Pty Ltd v Tong Tien See Construction Pte Ltd* [2002] 3 SLR 241 at [53] had endorsed the position stated in the House of Lords in *Foskett v*

McKeown [2001] 1 AC 102 that tracing is a process rather than a remedy. It is a process to enable the plaintiff to trace what has happened to his property, identify persons who have handled the property, and identify the new property as the substitute of the original property. Tracing normally precedes a claim. Although the court was only concerned with equitable tracing and only applied equitable tracing in the case, these observations are nevertheless important. By identifying tracing as a process that precedes a claim, the court implicitly accepted the neutrality of the process to the claim. In turn, this appears to be an implicit acceptance of another point made in *Foskett v McKeown* (at 113 (Lord Steyn)) that the tracing process should be neutral; it should not differ depending on whether one is claiming at common law or equity.

19.29 This had marked an important staging post from 1991 when Lord Goff of Chieveley in the leading case of *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 580–581 expressed the hope that the recognition of the principle of unjust enrichment and the defence of change of position would help to rationalise and harmonise tracing at common law and in equity. But this new staging post is couched in terms of property law, not the law of unjust enrichment, and there is consequently uncertainty as to the relationship between the law of property and the law of unjust enrichment. In particular, how is *Lipkin Gorman v Karpnale Ltd* itself to be explained? Was the action for money had and received made after the common law tracing exercise one that arose to protect property rights or to reverse an unjust enrichment? This fundamental theoretical difficulty aside, although there are clear benefits to having unified tracing rules, it is also not very clear what it means to have a neutral tracing process. For the present, the law is still in a state of flux, and tracing problems will still need to be resolved by the distinct substantive principles of common law and equity. The following case illustrates that the relationship between the law of property and the law of unjust enrichment, and the relationship between the common law and equity within the spheres of the law of property and the law of unjust enrichment, remain difficult to disentangle.

"At the expense of"

19.30 A crucial element in a cause of action based on the reversal of an unjust enrichment is that the benefit unjustly received by the defendant had been at the expense of the plaintiff. The plaintiff has to show that he was the source of the defendant's enrichment. An issue of this type arose in the case of *Chia Kin Tuck v Leong Choon Kum* [2005] SGHC 1. The plaintiff had alleged that he paid the first defendant (his then wife) the sum of S$1m to be

deposited in Australian banks to earn interest, to be expended on the further education of their children. The money was allegedly transferred to bank accounts belonging to the second defendant. The first defendant contended that the money had come from a close friend, the second defendant. At the trial, counsel for the second defendant also contested the plaintiff's ownership of the money he allegedly paid to the first defendant.

19.31 The District Court ([2003] SGDC 269) dismissed the claim of the plaintiff, because although it found that the money received by the first defendant had come from the plaintiff and not the second defendant, the money belonged not to the plaintiff but to a partnership (the partners of which were the plaintiff, his mother, and a brother of the plaintiff). Upon appeal to the High Court, Lai Siu Chiu J affirmed the findings of the District Court. However, the judge varied the order of the District Court. Agreeing with plaintiff's counsel that the District Court was wrong to require the plaintiff to prove ownership of the money claimed, the judge thought that the normal legal result would have been that the plaintiff's claim would be allowed, but with additional directions from the court that the partnership could claim the money from the plaintiff. In the result, considering that the defendants were not entitled to retain the money, the judge ordered the second defendant to return the money (with interest) to the plaintiff's solicitors pending resolution of the issue of the beneficial ownership of the money.

19.32 On the face of it, this looks like a case of equitable intervention in a common law suit. The plaintiff was entitled to claim at law, but the court imposed orders to ensure that the equitable interests were protected. This suggests that, in an appropriate case, even though the plaintiff can make out a case for the reversal of unjust enrichment against the defendant at common law, the court, acting in its equitable jurisdiction, may impose orders where it is evident that the plaintiff is not beneficially entitled to the sums paid to the defendant in order to protect a trust. This course of action sounds eminently sensible, except for the point explored below.

Failure of conditions and claims against third parties – common law and equity

19.33 Upon closer examination, however, the reported pleadings in the case revealed considerable confusion in the claim. In the District Court judgment (*supra* para 19.31), it was stated (at [2]) that the plaintiff's claim was for money had and received. This is a common law claim, the underlying allegation being that the defendant has come under an implied restitutionary obligation to return a sum of money which has been received in

circumstances that have unjustly enriched the defendant. This restitutionary obligation may arise because the defendant has received money from the plaintiff in circumstances which give rise to a claim based on unjust enrichment, or simply because the defendant has received the plaintiff's money in circumstances where the plaintiff had not intended to pass legal title in the money.

19.34 The plaintiff's statement of claim, however, alleged that the first defendant had received the money on trust for the plaintiff, the money to be applied to the education of their children, and that the second defendant had received the money from the first defendant knowing that the transfer had been made in trust. The claim looks totally inconsistent. If the allegation is that there was a trust, then legal title must have passed to the trustee (the first defendant), who could pass legal title to the second defendant. There is no scope for the beneficiaries to sue in the common law action for money had and received (see the analogous case of *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675). Moreover, assuming standing to sue, while a common law action in money had and received could lie where a recipient has received money (legal title passing) for a particular purpose and then failed to perform that purpose, it is difficult to see how a common law action for money had and received can lie against a subsequent recipient unless the plaintiff can show that he had legal title to the money received by the subsequent recipient, *ie*, through tracing (*Agip (Africa) Ltd v Jackson* [1990] Ch 265 at 285–288), or perhaps, exceptionally, where the plaintiff has a claim in restitution against the immediate recipient, and the latter in turn has a restitutionary claim based on the same unjust factor against the subsequent recipient (by analogy with *Khan v Permayer* [2001] BPIR 95). In academic literature, it has been argued that for earmarked sums which are paid out for a specific purpose, proprietary claims may lie upon the failure of the purpose (Peter Birks, *Unjust Enrichment* (Oxford University Press, 2nd Ed, 2005)); but apart from *Quistclose* trust cases in equity (from *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 ("*Quistclose*")) where equitable title has been retained by the plaintiff, there is no support for this proposition in the common law authorities, and there is nothing in the District Court (or High Court) judgment that suggested that this argument was being made. It is therefore not surprising that the District Court judge took an approach in substance that the claim was being made by a beneficial owner following trust money. The plaintiff, having failed to establish the extent of his beneficial interest in the money which he sought to follow, must fail in his claim.

19.35 The reasoning in equity also explains why the District Court judge was concerned that the plaintiff should have to prove beneficial ownership. The confusion in the High Court arose from the conflation with the common law action for money had and received. In the common law action, it is not necessary to show that what the defendant has retained is owned by the plaintiff. But it is necessary to show that what the defendant has received was owned by the plaintiff at law (or, at least in a world of relative legal title, that the plaintiff had a right to immediate possession to the money). This is to establish the basic proposition that the defendant's benefit was received (though not necessarily retained) at the plaintiff's expense (assuming that this claim is one to reverse unjust enrichment; otherwise it is to demonstrate that it is the plaintiff's property that is being protected).

19.36 In the High Court (*supra* para 19.30), counsel for the plaintiff argued and the judge accepted that the plaintiff did not have to show ownership to establish his claim in the action for money had and received. While plaintiff's counsel argued that it was enough that the plaintiff should show possessory title, or alternatively that the plaintiff had standing to sue by dint of having some beneficial ownership in the money, the judge appeared to focus on the point that there was no need for the plaintiff to show beneficial title to make the common law claim (at [91]). On the facts, there was no evidence to contradict the *prima facie* position that, once it was found that the plaintiff was the source of the payment to the first defendant, the plaintiff had sufficient legal title to succeed in an action for money had and received. The decision did not go so far as to endorse counsel's argument that possessory title (as opposed to legal ownership) was sufficient to found a claim for money had and received. However, there was nothing to show how the second defendant became liable on a common law claim; there was no analysis of the plaintiff's title to trace, or the process of tracing, legal title to the second defendant through the various bank accounts, nor is it clear how the plaintiff could, as a result of tracing, assert legal title to the second defendant's chose in action against her bank.

19.37 On the other hand, the case is easily explicable from the perspective of equity. A classic *Quistclose* (*supra* para 19.34) trust had been created because the first defendant had received money from the plaintiff to be used solely for a specific purpose. The plaintiff was claiming beneficial title in the property held by the second defendant at common law, by virtue of the receipt of trust property, with knowledge of the breach of trust, and his claim ultimately failed because he could not prove the extent of his beneficial ownership. The eventual order of the High Court was made to protect the interests of the beneficial owners, including the plaintiff. So what appears at

first sight to be a case of equitable intervention in a common law action for restitution is better explained as one of the operation of equity within the law of property.

The first-in-first-out rule in *Clayton*'s case

19.38 The nature of the rule in *Clayton*'s case (*Devaynes v Noble* (1816) 1 Mer 572; 35 ER 767) was considered briefly in observation by Andrew Phang Boon Leong JC (as he then was) in *Q & M Enterprises Sdn Bhd v Poh Kiat* [2005] 4 SLR 494. The rule in *Clayton*'s case states that unless otherwise agreed between two parties in a creditor-debtor relationship and in the absence of contrary appropriation by either party at the time of payment, sums paid to the credit of a current account are to be applied in discharge of the indebtedness in the order in which the indebtedness was incurred. This rule is also considered applicable in the context of equitable tracing, in particular, the following of trust money through bank accounts.

19.39 The case itself deals with the question of the relationship between an application for summary judgment on the merits and an application for stay of proceedings on the basis that the Singapore court was not the appropriate forum to hear the case. In the course of dealing with the issue whether summary judgment was appropriate in the circumstances in the first place, the judicial commissioner considered that there was clearly at least one triable legal issue whether the rule in *Clayton*'s case could apply on the facts of the case, and that there were additional questions of fact which needed to be determined if the rule was found to be applicable (at [50]–[62]). The plaintiff, a Malaysian-registered company, was suing the defendant, a Singapore national, on a personal guarantee furnished to the plaintiff for a loan provided by the plaintiff to a Malaysian manufacturing company. The defendant contended that the loan had in fact been fully repaid by the principal borrower by virtue of certain sums paid by the borrower to the plaintiff.

19.40 Without ruling on any point, because it was enough for the court to find the existence of triable issues, the judicial commissioner observed that the rule in *Clayton*'s case may not necessarily be confined to banker-customer relationships (at [55] and [58]). The judicial commissioner also observed that the perceived arbitrariness of the rule has led judges in England frequently to distinguish *Clayton*'s case on the facts and suggested that an acknowledgement by the Singapore court of the true nature of the rule as an evidential presumption rather than a substantive rule of law would counter many of the criticisms directed against the rule (at [56]–[57]).

Free acceptance? Abandoned and non-existent contracts

19.41 In *Kensteel Engineering Pte Ltd v OSV Engineering Pte Ltd* [2005] 2 SLR 253, issues arose as to remuneration for services rendered under a contract which was subsequently abandoned, as well as for services rendered after the contract was abandoned without the formation of a new contract. The plaintiff had sued the defendant under two different contracts, but for the purpose of this review, the concern is only with the defendant's counterclaim in respect of one of the contracts. The plaintiff had engaged the defendant as a subcontractor to design and fabricate parts of an air ventilation system for a certain building project. There was a dispute as to the terms of the agreement, and the plaintiff was suing the defendant for breach of contract for failure to deliver by the contractual deadlines. In turn, the defendant counterclaimed for work done for the plaintiff.

19.42 Andrew Ang JC (as he then was) found that there had been no breach of contract by the defendant. In respect of the counterclaim, the judicial commissioner found (at [43]) that it was clear from the conduct of the contracting parties that they had agreed to abandon their mutual rights under the agreement, and that what the parties had subsequently agreed to (essentially that the plaintiff would take over the work assigned to the defendant and the defendant's role would be reduced to one of consultation) was not sufficiently precise to amount to a fresh contract (at [44]). Nevertheless, it was clear to the judicial commissioner that the defendant was entitled to be paid on a *quantum meruit* basis for the work partially done before the mutual abandonment of the contract as well as for the work done thereafter (at [45]).

19.43 The only reasoning provided to support the decision to allow the counterclaim was short and sharp: "it was obvious that the plaintiff could not take the benefit of what had been performed by the defendant for free" (*ibid*). The court did not elaborate on why the success of the *quantum meruit* claims was obvious. On a restitutionary analysis, the rationale could lie in the plaintiff's free acceptance of the work done by the defendant in circumstances where the services were clearly of economic value to the plaintiff, the plaintiff knew that the services were not offered for free, the plaintiff had a free choice whether to accept or reject the services, and the plaintiff voluntarily accepted the services.

19.44 There are two other alternative explanations; but it is less clear that they can be made out on the facts, so to that extent these lines of reasoning are less "obvious". One is that the defendant was entitled to recover for total

failure of consideration as the services were done (to the knowledge and acquiescence of the plaintiff) on the basis that the original contract would continue to exist. A further explanation for recovery for services conferred after the abandonment of the contract is that the subsequent services were conferred under a mistake (whether of fact or law) that a new contract had been formed between the parties. As the latter two lines of reasoning would require findings of fact which are not evident in the judgment, it would appear that, in so far as the decision on the counterclaim was based on the unjust enrichment of the plaintiff at the expense of the defendant, the "obvious" basis for recovery lies in the free acceptance of the benefit, even if this basis of restitutionary ground has not yet been expressly accepted by the courts in Singapore.

19.45 The court did not directly address the question of the effect of any contractual allocation of risks on the restitutionary claims. However, the court did expressly reject (at [41]) the plaintiff's argument that there was an implied term between the parties that the defendant was to bear all the costs on the ground that there was no basis for implying such a term. The argument was apparently to the effect that the implied term was part of the original contract (the court rejected the argument on the alternative ground that such a term would be unnecessary on the basis of the plaintiff's position that the contract had been terminated for breach). No argument appeared to be directed to the question whether there was any risk allocation in the contract of abandonment itself that would be disturbed by allowing the restitutionary claims; but it would appear to be equally difficult to base any such argument on the facts, especially since the contract of abandonment was inferred from conduct. Thus, there did not appear to be any contractual risk allocation to bar the restitutionary claims in this case.

Mistaken payment and the Workmen's Compensation Act

19.46 *Kamis bin Satari v Nasir Natarajan* [2006] 1 SLR 102 deals with the problem of mistaken payments in the context of the Workmen's Compensation Act (Cap 354, 1998 Rev Ed). The plaintiff had been injured in the course of employment allegedly caused by the fault of the defendant, his co-worker, while travelling in a vehicle owned by their employer. The defence was conducted by the employer's insurer of the vehicle involved. The plaintiff had sought from the vehicle insurer $10,000 as interim payment of damages, and the insurer agreed to and made an interim payment of $5,000 to the plaintiff. The insurer subsequently discovered that the plaintiff had already received compensation of $11,025 from another of his employer's insurers under the Workmen's Compensation Act. Section 18(*a*) of the statute

provides that the injured workman shall not be entitled to recover both damages under the general law and compensation under the statute. The vehicle insurer applied to strike out the plaintiff's claim and for the return of the $5,000 interim payment. The deputy registrar allowed the application and the decision was upheld by a district judge. The plaintiff appealed to the High Court.

19.47 In the High Court, the plaintiff argued that he should be allowed to keep the statutory compensation and to maintain the common law action because he had genuinely thought that the statutory compensation was an interim payment from the vehicle insurer. Disbelieving that the plaintiff had made a genuine mistake in the light of the evidence presented, Woo Bih Li J dismissed the argument and the appeal.

19.48 Woo J also dismissed the appeal on the alternative basis that there had indeed been a genuine mistake. On the facts, the plaintiff claimed that he had spent the money and was unable to return the sum. The judge held (at [9]) that although the statute was silent on the issue, a workman who had received compensation under a genuine mistake could, by returning the compensation so received, nevertheless proceed with an action in damages. The judge dismissed the proposal of counsel for the plaintiff that the compensation could be deducted from the eventual damages awarded, pointing out (at [14]) that there was no certainty that the plaintiff would win, or be awarded a sum exceeding the compensation awarded even if he won. Moreover, the judge held that as a matter of policy, to allow the plaintiff to continue with the action for damages in such cases without first requiring the return of the compensation could lead to abuse; it could encourage employees not to disclose the fact of compensation under the statute while maintaining an action against some person other than the employer, and to plead mistake when discovered.

19.49 There was, strictly speaking, no obligation to return the compensation awarded under the statute. The workman is entitled to keep the money, except that in that event he would be disentitled from suing for damages at general law. The court had implied into the legislation a condition that a workman who accepts compensation by a genuine mistake can reverse that compensation and seek damages under the general law instead. This is consistent with a purposive reading of the statutory provision; it is unlikely that the provision is intended to take a penal attitude towards honestly mistaken workmen.

19.50 The interim payment was not made by order of the court, but by the agreement of the parties. Had it been paid under an order of court, the court could simply have ordered its return upon the striking out of the action (O 29 r 17 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed). The return of the money would, in the circumstances, therefore have to be based on contract (an express or implied obligation to return the money if the action were struck out) or restitution. Although the court did not elaborate on the reasons for the return of the money, it would not be difficult to argue for such an implied term in the agreement if it was not express.

19.51 As far as the law of restitution is concerned, this is probably an obvious case where restitution ought to be ordered. There are several possible explanations. It would appear that the vehicle insurer had paid the money to the plaintiff under a mistake of fact that the workman had not received any compensation under the statute, and consequently the plaintiff had been unjustly enriched at the insurer's expense. It is probable that the insurer would not have paid the money had it known at the time of payment of the earlier compensation received by the plaintiff; the insurer would not have paid the money *but for* the mistake. That would appear to be sufficient to ground an action for money had and received, even if, based on the judge's holding on the law, the plaintiff could still have maintained the common law action for damages by returning the compensation. However, the problem with this reasoning is that there was an underlying contract under which the payment was made. So long as the payment was made pursuant to a valid contractual obligation, the mistake cannot ground a restitutionary claim (*Info-communications Development Authority of Singapore v Singapore Telecommunications Ltd (No 2)* (*supra* para 19.26). For the mistake reasoning in restitution to work, the contract would have to be argued to be void for mistake in the first place.

19.52 Alternatively, it could be argued that the agreement for payment was terminated upon the striking out of the action, and the payment had been made on the condition of the continuing existence of the agreement; recovery would be based on total failure of consideration. The argument based on failure of consideration could even work if the contract was still valid, provided that it was clear that the restitutionary claim was not inconsistent with the contractual risk allocation: *Roxboroughs v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516. Yet another possibility is that the basis of the payment (that the payer would be found liable) disappeared the moment the action was struck out; but this line of reasoning depends on the new Birksian theory of absence of basis (Birks, *Unjust Enrichment* (*supra* para 19.34)), which has yet to receive endorsement by the courts (the initial

response from the English Court of Appeal has been somewhat lukewarm: see *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] Ch 243 at [274].